

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDERSON,

Appellants,

vs.

RAY BULLERDICK, et al.,

Appellees.

SUPPLEMENTAL
Transcript of Record

(Pages 579 to 594)

Appeal from the District Court for the
Territory of Alaska,
Third Division

FILED

DEC -1 1950

PAUL F. O'BRIEN,
CLERK

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No. 12324

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellants,

vs.

RAY BULLERDICK et al,

Appellees.

STIPULATION

It is hereby stipulated by and between the appellants, represented by Harold J. Butcher, attorney at law, and the appellees, represented by George B. Grigsby, attorney at law, that the oral opinion of the trial court in the above captioned case which is included in the typewritten draft of the Transcript of Trial Proceedings on file in the Clerk's office of the U. S. Court of Appeals for the Ninth Circuit, commencing with page 3 and ending with page 10 of Volume II and bound at the back of said volume and which is unauthenticated by the reporter who authenticated the rest of the Trial Proceedings, is a true record of the Court's oral opinion.

This Stipulation is made for the purpose of including said oral opinion in the Supplemental Record for which request has been made to have printed, together with copies of the summons and returns showing service upon Ralph R. Thomas and Audrey Cutting.

/s/ HAROLD J. BUTCHER,

/s/ GEORGE B. GRIGSBY.

[Endorsed]: Filed U.S.C.A. November 4, 1950.

Court Room,
Federal Building,
Anchorage, Alaska,
Friday, March 4, 1949.

Before: The Honorable Anthony J. Dimond,
United States District Judge.

Appearances:

GEORGE B. GRIGSBY,

Attorney at Law, Anchorage, Alaska,
appearing for Ray Bullerdick, et al.,
plaintiffs in Cause No. A-5087, Ted Van
Thiel, et al., copartners as Brady's Floor
covering; E. V. Fritts, et al., copartners
as Alaska Paint and Glass Company;
and City Electric of Anchorage, Inc., a
corporation, plaintiffs in cause No.
A-5088 and the intervenors, Ted Van
Thiel, et al., copartners as Kennedy
Hardware.

J. L. McCARREY, JR.,

Attorney at Law, Anchorage, Alaska, ap-
pearing for intervenors, Arthur F. Wal-
dron, et al., copartners as Anchorage
Sand and Gravel Company.

WENDELL P. KAY,

Attorney at Law, Anchorage, Alaska, ap-
pearing for intervenors, Ketchikan
Spruce Mills, Inc., a corporation, and
Alaskan Plumbing and Heating Com-
pany, Inc., a corporation.

HERALD E. STRINGER,

Attorney at Law, Anchorage, Alaska, appearing in the capacity of intervenor as Trustee for the Estate of Russell W. Smith, Bankrupt.

EDWARD V. DAVIS and

PAUL F. ROBISON,

Attorneys at Law, Anchorage, Alaska, appearing for intervenors, Ken Hinchey and Nadine Hinchey, co-partners, as Ken Hinchey Company; intervenors, Ray Wolfe, Esther Wolfe, et al, copartners as Wolfe Hardware and Furniture.

HAROLD J. BUTCHER,

Attorney at Law, Anchorage, Alaska, appearing for the defendants, Audrey Cutting, and Sylvia A. Henderson, a minor.

(No appearance was made by the defendant Ralph R. Thomas in person or by attorney.)

(Whereupon, at 10 o'clock, a.m., Friday, March 4, 1949, the above-entitled matter came on for decision and rendering of judgment.)

PROCEEDINGS

The Court: In causes No. 5087 and 5088, the first one being Ray Bullerdick and others against Ralph R. Thomas and others; and the second being Ted Van Thiel and others against Ralph R. Thomas

and others, which were consolidated for trial, I find generally in favor of the plaintiffs and the intervenors who have submitted claims of lien upon the property for labor performed or material furnished in the construction of a dwelling house on the property.

Question was raised as to the validity of the liens. I find that each and all of the liens are valid because they sufficiently comply with the law in our statutes upon the subject governing the matters which must be stated in the lien claims.

All of the lien claims were filed in time. In fact, there is no dispute, I think, upon that question. Question was also raised as to the sufficiency of the pleadings. The pleadings filed on behalf of the original plaintiffs are in all respects adequate. The other pleadings filed on behalf of certain intervenors may be considered as amended to conform with the proof.

Those amendments so far as the intervenors' pleadings are concerned are to the effect that the work done and materials supplied were done and supplied at the instance of the then owner and record owner, Ralph R. Thomas. That averment or one equivalent to it is contained in the original complaints in each action, and it will be considered that any of the defendants may have denied that averment.

I do not know why it should be necessary to plead anything that the law says exists. The law says that work done under such circumstances shall be considered to be done—shall be deemed to be done—

and materials furnished shall be deemed to be furnished at the instance of the owner.

Yet our own Circuit Court of Appeals in the case of Haines against Russell evidently held that it was necessary to plead what the law itself provides to be the fact. That decision, it is true, was rendered in 1904. But as far as I know it has never been overruled.

Therefore, I follow it to the extent of saying that the pleadings may be considered amended to contain such averment.

Some of the pleadings fail to refer to the claim of the defendant, Sylvia Henderson. Those pleadings under the proof may be considered as amended by stating in substance that the defendant, Sylvia Henderson, claims some title or interest in the property adverse to the plaintiffs and intervenors but that such claim and title is subordinate to the claims of plaintiffs and intervenors and it shall be considered that any part of the pleadings adverse to the claim of the defendant, Sylvia Henderson, or any other defendant is denied.

Question has arisen here as to the date of the delivery of the deed executed by the defendant, Ralph R. Thomas, to the defendant, Sylvia Henderson. In my opinion, the deed was not delivered at the time it was executed and it was only delivered when it was released from the bank shortly before the fourth of August if not on the fourth of August. While no particular point was made of it, there is at least grave doubt as to whether Sylvia Henderson ever executed any mortgage in favor of Ralph

R. Thomas. The original mortgage was not produced in court. It was never recorded.

All that was produced in court was what a witness claimed to be a copy of it.

It seems to me that if the mortgage had actually been executed it would have been produced because the defendant, Audrey Cutting, produced in court the note to secure the payment of which the mortgage was given.

It is almost incomprehensible to believe that all of these papers would have been placed in escrow under the circumstances. It would have been certainly much more appropriate to have the deed delivered at the time of execution and the mortgage delivered, and both recorded.

Now I hold in favor of the plaintiffs upon another ground and that is because the deed from Thomas to the defendant, Sylvia Henderson, a minor, was not recorded until August 4, 1948, long after all of the work was done and the materials supplied.

I further find that none of the plaintiffs or intervenors claiming liens had any actual notice of the deed to Sylvia Henderson until after the work was done and the materials supplied. Under our law an unrecorded instrument of this kind cannot affect the liens of people who have in good faith given labor and furnished materials for the construction of a building. In act, everything that went into that building, the building as it now stands is the result and the result only of the labor and materials of these lienholders and to deny them their liens because an unrecorded deed was held by a minor, a

minor nevertheless of the age of discretion, would be certainly not in harmony with justice and would be, in my judgment, an outrage upon justice.

It is true as a matter of law that if the deed had been recorded when it was executed then the lien claimants would have had constructive notice of it. And if they did not have actual notice it would not have made any difference, their liens would have failed as against Sylvia Henderson's claim. But there was neither actual or constructive notice on the part of the lien claimants and therefore their liens are in every respect superior to the claim of title of Sylvia Henderson.

Another issue was that of posting notices on the ground. The notices as posted would have been effective only to give actual notice of the claim of Sylvia Henderson. So far as Andrey Cutting was concerned, although she held herself out to be the owner, had contracted as the owner, she now says she had no interest in it and had no interest in it at that time. So any posting of notices on her part would have been futile under the doctrine laid down by the Court of Appeals for the Ninth Circuit in the case of *Artic Lumber Company against Borden*, reported in 211 *Pacific* at page 50.

Neither could the defendant, Thomas, claim anything by reason of the posting of the notices, although he did not post any notices.

Moreover, I find that the notices were not posted within three days of the commencement of the work on the property. There was detailed discussion about that—detailed testimony—as to whether the notices

were posted. But they weren't posted at the time claimed and they weren't posted, if posted at all, until long after the work was commenced. In my judgment there was no notice posted on the outside of the property at all.

The sum and substance of the testimony is that no notice was posted except possibly one in the basement. I arrive at the conclusion that one may have been posted in the basement only because another witness found a copy of the notice, which was introduced in evidence, in the basement after he moved in as a tenant of the building.

I think there is no other issue that requires discussion except the matter of attorneys fees. For the plaintiffs in the action, an attorney fee—in the Bullerdick action—an attorney fee of \$750.00 is allowed.

For the plaintiffs in 5088, Brady's Floor Covering and others, an attorney's fee of \$350.00 is allowed.

For Ketchikan Spruce Mills and Alaskan Plumbing & Heating Company, an attorney fee of \$700.00 is allowed.

For Anchorage Sand and Gravel Company and Cinder Concrete Products Company, an attorney's fee of \$300.00 is allowed.

For Wolfe Hardware and Ken Hinchey an attorney's fee of \$300.00 is allowed.

For the Referee in Bankruptcy of the bankrupt estate of the defendant, Smith, an attorney fee of \$500.00 is allowed. Incidentally, the defendant, Smith's, claim—lien claim—is valid to the extent

of \$10,000.00 and no more, but it is subject and subordinate to the other claims of liens and therefore I suppose it is absolutely valueless.

There was convincing testimony to the effect that Ketchikan Spruce Mills and Anchorage Sand and Gravel Company, who have claims in the respective amounts of \$2,717.86 and \$1,685.00, did not advance credit to the defendant, Smith, but did advance credit to the defendant, Cutting. That testimony, in my judgment, is true. There is not even a reasonable doubt about it.

Therefore, these two intervenors in addition to have claims of lien on the building are entitled to personal judgments against the defendant, Audrey Cutting, in the amounts named.

I hope that counsel for the plaintiffs and intervenors will join in drawing one set of finds of fact and conclusions of law and judgment. I think that is the only practical way to handle it.

Mr. Grigsby: If Your Honor please, Your Honor has made no statement with regard to priorities of the various lien claims.

The Court: As far as I know, all of the liens are of equal rank.

Mr. Grigsby: I ask if Your Honor has considered the provision in the Compiled Laws of 1933 under the heading "Liens" entitled "Provisions common to all liens"?—

The Court: I have read that.

Mr. Grigsby: —in which labor is given a priority over materials? I just call Your Honor's attention to that.

The Court: I am glad counsel brought it up. I shall go into it and give an opinion upon that later. I ask counsel to go back to the genesis of that Act however. I think it was passed in 1919, and although the provisions are listed in the Compiled Laws as being applicable to all liens, it has been urged in this Court heretofore that by reason of the facts that the Act as drawn did not refer to mechanics liens that mechanics liens are not included in it.

I hope Counsel, all of Counsel, will go into that and I shall make a further examination and give a decision upon that point later.

Mr. Grigsby: May we have a copy of the memoranda?

The Court: I have nothing here.

Mr. Grigsby: The only thing, I didn't get all of it. I suppose each counsel took his own?

The Court: I will prepare a memorandum with sufficient copies to give a copy to each of counsel.

Anything further to come before the Court in connection with this matter?

(No response.)

(Whereupon, at 10:10 o'clock, a.m., Friday, March 4, 1949, the giving of decision and rendering of judgment was concluded.)

In the District Court of the United States for the
Territory of Alaska, Third Division

No. A-5087

RAY BULLERDICK, A. L. BAXLEY, EDWARD
C. RANKIN, LEE RUNKLE, ARDEN BELL
and WILLIAM BESSER,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

SUMMONS

The President of the United States of America,
Greeting:

To the Above-Named Defendant:

You Are Hereby Required to appear in the District Court for the Territory of Alaska, Third Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiffs will take judgment against you for want thereof and will apply to the Court for the relief demanded in said complaint.

Witness, the Hon. Anthony J. Dimond, Judge of said Court, this 24th day of July in the year of our Lord one thousand nine hundred and forty-eight.

M. E. S. BRUNELLE,
Clerk.

[Court Seal] By VIRGINIA OLSON,
Deputy Clerk.

United States Marshal's Office,
Territory of Alaska, Third Division.

I Hereby Certify, that I received the within writ on the 4th day of August, 1948, and personally served the same on the 4th day of August, 1948, by delivery to and leaving with Ralph R. Thomas, one of the said defendants named therein personally, at Anchorage, Alaska, in said Division of said Territory, a copy thereof, together with a copy of the complaint, certified to by, attached thereto.

Dated at Anchorage, Alaska, the 4th day of August, 1948.

JAMES H. PATTERSON,
U. S. Marshal.

By /s/ W. B. HEALY,
Deputy.

A true copy.

[Endorsed]: Filed, District Court, Territory of Alaska, August 4, 1949.

In the District Court of the United States for the
Territory of Alaska, Third Division

No. A-5088

TED VAN THIEL, PATSY VAN THIEL, E. P.
CARTEE, JEAN CARTEE, R. C. REEVE,
and JANICE REEVE, co-partners under the
firm name and style of KENNEDY HARD-
WARE, and GENE BRADY, Co-partners
under the firm name and style of Brady's Floor
Covering, and E. V. FRITTS, WILLIAM J.
WALLACE, and EINER G. NELSON, Co-
partners under the firm name and style of
ALASKA PAINT AND GLASS CO., and
CITY ELECTRIC OF ANCHORAGE, INC.,
a Corporation,

Plaintiffs,

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Defendants.

SUMMONS

The President of the United States of America,
Greetings:

To the Above-Named Defendants:

You Are Hereby Required to appear in the Dis-
trict Court for the Territory of Alaska, Third Di-
vision, within thirty days after the date of service
of this summons upon you, and answer the com-
plaint of the above-named plaintiffs, a copy of which
complaint is herewith delivered to you; and unless

you so appear and answer, the plaintiffs will take judgment against you for want thereof, and will apply to the Court for the relief demanded in said complaint.

Witness, the Hon. Anthony J. Dimond, Judge of said Court, this 24th day of July, in the year of our Lord one thousand nine hundred and forty-eight.

M. E. S. BRUNELLE,
[Court Seal] Clerk.

By /s/ VIRGINIA OLSON,
Deputy Clerk.

United States Marshal's Office,
Territory of Alaska, Third Division:

I hereby certify that I received the within writ, a summons, on the 4th day of August 1948, and personally served the same on the 4th day of August 1948, by delivering to and leaving with Ralph R. Thomas, one of the said defendants named therein personally, at Anchorage, Alaska, in said division of said Territory, a copy thereof, together with a copy of the complaint, certified to by George B. Grigsby, attorney, attached thereto.

Dated at Anchorage, Alaska, the 4th day of August, 1948.

JAMES H. PATTERSON,
United States Marshal.

By /s/ W. B. HEALY,
Deputy.

A true copy.

[Endorsed]: Filed District Court, Territory of Alaska, August 4, 1948.

In the United States District Court for the Territory of Alaska, Third Division at Anchorage

Nos. A-5087—A-5088

RAY BULLERDICK, et al.,

Original Plaintiffs.

TED VAN THIEL, et al.,

Original Plaintiffs.

vs.

RALPH R. THOMAS, AUDREY CUTTING and
RUSSELL W. SMITH,

Original Defendants.

ARTHUR F. WALDRON, et al.,

Plaintiffs in Intervention.

vs.

SYLVIA A. HENDERSON,

Defendant in Intervention.

SUPPLEMENTAL DESIGNATION OF RECORD

For the purpose of printing a Supplemental Record on Appeal in the above entitled case, appellant designates for inclusion in a Supplemental Transcript of the Record the summons issued for service on Ralph R. Thomas and the summons issued for service on Audrey Cutting, together with the Marshal's return of service on the above sum-

mons, and this Supplemental Designation of Record.

/s/ HAROLD J. BUTCHER,
Attorney for Appellant.

A true copy.

[Endorsed]: Filed District Court, Territory of Alaska, November 1, 1950.

[Endorsed]: No. 12324. United States Court of Appeals for the Ninth Circuit. Audrey Cutting and Sylvia A. Henderson, Appellants, vs. Ray Bullerdick, et al, Appellee. Supplemental Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed November 6, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.